Supreme Court, U.S.
FILED
FEB 29 2000
CLERK

(4)

No. 99-859

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

Timothy Jones
W. Allen Bennett
Sagaser, Franson & Jones, P.C.
2445 Capitol St.
Second Floor
Fresno, CA 92721

Thomas C. Goldstein
(Counsel of Record)
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

March 1, 2000

13pp

QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ii
REPLY OF THE PETITIONER 1

TABLE OF AUTHORITIES

Pages

Cases

California v. *United States*, 438 U.S. 645 (1978) 6
City of Fresno v. *California*, 372 U.S. 627 (1963) 6
Dugan v. *Rank*, 372 U.S. 609 (1963) 6
Hiersche v. *United States*, 503 U.S. 923 (1992) 9
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) 5, 6
United States v. *James*, 478 U.S. 597 (1986) ..... passim

Statutes

Central Valley Improvement Act, 102 Pub. L. 575, § 3402, 106 Stat. 4600 (1992) 8

Other Authorities

Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 9
Dep't of the Interior, *Central Valley Basin*, S. Doc. 113, 81st Cong., 1st Sess. 162 (1949) 7
No. 98-1667, *Balar* v. *United States*, Br. of the United States 10

REPLY OF THE PETITIONER

Certiorari should be granted because the circuits are irreconcilably divided over whether the Flood Control Act confers immunity on the government for damages caused by waters not carried "for purposes of or related to flood control," and because the Ninth Circuit's holding that immunity is conferred in that circumstance avowedly "delete[s]" an essential part of the holding of *United States* v. *James*, 478 U.S. 597 (1986). Because this case was dismissed on the pleadings, the lower courts accepted as true the allegation of the complaint that Petitioner's farm was damaged by irrigation waters rather than flood waters, but held that circuit precedent required dismissal solely because the waters were carried in a public works project that has flood control as one of its purposes.

Respondent does not seriously dispute that certiorari is warranted on that basis or that the circuit conflict is squarely presented in this case. Instead, precisely because it is so clear that several circuits would have refused to dismiss this case, Respondent in the Brief in Opposition ("BIO"), at 6-11, attempts to contend that the waters that damaged Petitioner's farm *were* flood waters. But Respondent never even attempts to explain why its argument is at all relevant given the procedural posture of the case, in which the allegations of the complaint to the contrary must be accepted as true. If Respondent's position were accepted, plaintiffs (including the United States) whose claims were dismissed as a matter of law would *never* be able to seek review in this Court because the brief in opposition would contest the complaint's allegations of fact. But that is of course ridiculous. Indeed, as we demonstrate in detail below, Respondent's argument is seriously disingenuous: the BIO fails to advise the Court that Petitioner repeatedly sought to present its evidence on this factual question in the lower courts, but Respondent successfully asserted that the allegations of the complaint should be accepted as true and the case dismissed as a matter of law. Nor does Respondent acknowledge that this Court repeatedly has rejected its

newfound factual position, concluding that the Friant Dam and Madera Canal serve irrigation functions and are not flood control facilities.

Because this case was dismissed taking as true that Petitioner's farm was damaged by irrigation waters, because Respondent does not seriously dispute that dismissal on that basis conflicts with this Court's decision in *James* as well as decisions of other circuits that have been faithful to *James*, and because there is no dispute that this issue recurs frequently and is an important and unresolved question of federal law, Pet. 23-25, the Petition for Certiorari should be granted.

1. Petitioner's Complaint alleges that the Madera Canal serves only irrigation purposes. Compl. ¶ 7. In moving for Judgment on the Pleadings based on the immunity provision of the Flood Control Act, Respondent "[a]ccept[ed] plaintiff's allegations as true" and frankly acknowledged that "[t]he Madera Canal is used to convey irrigation water to various lands in the San Joaquin Valley. Compl., ¶ 7." C.A. Ex. Rec. 139, 144. Respondent's position was that "the Madera Canal's irrigation purpose is immaterial, and plaintiff's judicial admission that the Madera Canal is a component of the Central Valley Project is dispositive." *Id.* 146. Specifically, "[t]he Ninth Circuit holds the government immune from damage caused by waters in a flood control project, even if those waters were used *solely* for irrigation." *Id.* 148 (emphasis added). Respondent steadfastly maintained that position on appeal, contending that "[t]he damage sustained by Central Green resulting from a water leak from the Madera Canal *that was used for irrigation* is well within this circuit's test for applicability of flood control immunity created by 33 U.S.C. § 702c." Resp. C.A. Br. 5 (emphasis added). Respondent made perfectly clear that "while the Madera Canal may have been used for irrigation purposes in this instance, the fact that it is a component of the Central Valley Project, a flood control project, results in immunity for the government for damage caused by leakage from the Madera Canal." *Id.* 14.

Petitioner, by contrast, always has contended that this Court's decision in *James*, 478 U.S. at 605, required Respondent to prove that the waters that damaged Petitioner's farm were carried in the Canal "for purposes of or related to flood control." Under the heading "Whether 702c Immunity Applies Is A Question Of Fact," Petitioner explained that "it is a question of fact as to whether or not the water that has damaged Central Green's property is flood water" and that dismissal was inappropriate because "defendants have presented *no evidence* to show the status of such water and accordingly, Plaintiff's claims must not be dismissed." C.A. Rec. 93 (emphasis added). Petitioner presented the same question as its only issue on appeal:

> Whether the District Court erred in holding that the immunity provision of the Flood Control Act of 1928 (33) U.S.C. §702(c) applied to bar CENTRAL GREEN's claims against USA, even though CENTRAL GREEN's Complaint expressly alleged that the cause of CENTRAL GREEN's damages was the water leaking from the Madera Canal which was being used for irrigation purposes not flood control?

Pet. C.A. Br. I. Petitioner explained: "Under the plain language of 33 U.S.C. §702(c) and the judicial interpretation applied by the Supreme Court in *United States* v. *James*, a question of fact exists as to whether USA is entitled to immunity. Accordingly, the District Court erred in granting USA's motion for judgment on the pleadings." *Id.* 4.

The lower courts found themselves bound by Ninth Circuit precedent to agree with Respondent that dismissal was required despite the fact that the government had disavowed any intent to prove that the waters that damaged Petitioner's farm were flood waters, and despite the fact that Respondent's position *precluded Petitioner* from presenting its evi-

dence that the waters served the purpose of irrigation. The district court thus granted Respondent Judgment on the Pleadings based on Ninth Circuit precedent holding that dismissal is required under the Flood Control Act if "[t]he project has flood control as one of its purposes, and the events giving rise to the action were not wholly unrelated to the project. That ends our inquiry. *We need not determine whether flood control efforts contributed to the flood.*" Pet. App. 15a (citations omitted).

On appeal, the Ninth Circuit agreed:

> Although the water in the Madera Canal *was not held for the purpose of flood control*, because it was part of the Central Valley Project, it was "not wholly unrelated" to flood control. As interpreted by this circuit, § 702c immunity prevents suit for damage from flooding caused by the negligent construction and maintenance of irrigation canals that are part of a flood control project.

Pet. App. 8a (citations omitted) (emphasis added). The panel below repeated the point to emphasize that the government was being awarded immunity notwithstanding the assertion of the complaint, which Respondent pointedly refused to contest, that the Canal served only the purpose of irrigation:

> The Madera Canal disburses irrigation water through the San Joaquin Valley. *The canal is not a flood control project and serves no flood control purpose.* Despite having *no flood control purpose*, the Madera Canal enjoys § 702c immunity *solely* because it is a branch of the Central Valley Project.

Id. 9a (emphasis added). The court emphasized that this holding not only "delete[d]" a clear requirement of this Court's decision in *James*, but also conflicted with decisions of several other circuits, and that this Court should accordingly grant certiorari to review the case. *Id.* 7a, 9a.

2. Based on the foregoing, Respondent's contention in the BIO, at 6-11, that the waters that damaged Petitioner's

farm *did* as a matter of fact serve a flood control purpose falls somewhere between irrelevant and seriously disingenuous. Thus, Respondent now maintains that certiorari should be denied because the Ninth Circuit was "incorrect" to conclude that "[t]he [Madera] canal is not a flood control project and serves no flood control purpose," BIO 11 n.3 (alterations in BIO), when it was *Respondent* that successfully insisted that the lower courts *accept* the assertion of the Complaint that the Canal served only purpose of irrigation, deem evidence on the purpose served by the Canal to be *irrelevant*, and *dismiss* the case as a matter of law. But having persuaded the lower courts not to resolve the factual question of the purpose served by the waters, Respondent cannot now evade the Ninth Circuit's square holding, which conflicts with *James* and decisions of other circuits and will result in considerable continuing uncertainty if certiorari is not granted, that the government has immunity for damages caused by non-flood waters.

Not only is Respondent's newfound factual assertion therefore irrelevant to the certiorari determination, but Respondent also fails to acknowledge that this Court repeatedly has rejected its claim that the Friant Dam and Madera Canal serve flood control functions. Thus, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950), explained that "[t]he Madera Irrigation District had been organized to build a dam at the Friant site and to divert San Joaquin waters *to irrigate* about 170,000 acres" (emphasis added). In *Gerlach*, the government unsuccessfully argued that the CVP, Friant Dam, and associated irrigation canals were a single integrated project with the overarching purpose of navigation or flood control, rather than "reclamation," *i.e.*, irrigation. This Court disagreed, explaining that Congress' broad declaration of purpose for the CVP, on which the Ninth Circuit has relied in deeming the entire CVP a flood control project, in reality "was intended to help meet any objection to its constitutional power to undertake this big bundle of big projects," not to turn each part of the CVP into a "flood control" facility. *Id.*

at 734. After an exhaustive review of the project's history, the Court concluded that "Congress realistically elected to treat it as a *reclamation* [*i.e.*, irrigation] project." *Id.* (emphasis added). The Court specifically came to that conclusion based on a review of the very 1949 Department of the Interior report now invoked by Respondent, which in fact explains that the Bureau of Reclamation had been assigned responsibility for "multiple purpose dams" such as the Friant Dam, in contrast to other "dams and other works *only for flood control* [that] are exclusively the responsibility of the Army Engineers." *Id.* (emphasis added). Decisions and opinions subsequent to *Gerlach* have consistently adhered to its description of the Friant Dam and Madera Canal as irrigation, not flood control, projects.[1]

Moreover, even the isolated excerpts from the Department of the Interior report invoked in the BIO in reality support Petitioner's view that waters are often released from the Friant Dam into the Canal for purposes of irrigation, not flood

[1] *See City of Fresno* v. *California*, 372 U.S. 627, 630 (1963) ("In *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), we were concerned with an issue regarding the nature of the Friant Dam unit of the Project and, contrary to petitioner's contention, concluded 'that Congress realistically elected to treat it as a reclamation project.'"); *Dugan* v. *Rank*, 372 U.S. 609, 613 (1963) ("The waters of the San Joaquin River are impounded by a dam constructed at Friant, approximately 60 miles upstream from Mendota. Friant Dam stores the water in Millerton Lake from which it is diverted by the Madera Canal on the north to Madera County and the Friant-Kern Canal on the south to the vicinity of Bakersfield for use in those areas *for irrigation* and other public purposes." (not referring to flood control) (emphasis added)); *see also California* v. *United States*, 438 U.S. 645, 680 (1978) (White, J., dissenting) ("One of the project's principal components is the Friant Dam, which interrupted the flow of the upper San Joaquin River, the impounded waters being distributed *to irrigate* lands not theretofore served by San Joaquin water." (emphasis added)).

control. Thus, the block quote from the report principally relied on by Respondent does not address the Friant Dam at all but, even assuming that it is relevant, it makes Petitioner's point clearly:

> Reservoirs would be used to store flood flows until they could be released at rates within the capacity of the channels below, ***or*** until they could be used to meet irrigation requirements. Irrigation canals in ***some cases*** [*i.e.*, not always or even necessarily often] would be used to advantage to carry a portion of the flood flows away from the danger zones to areas where the water could be used beneficially.

Dep't of the Interior, *Central Valley Basin*, S. Doc. 113, 81st Cong., 1st Sess. 162 (1949) (emphasis added).

Nor could Respondent find any support at all (including by making a representation on behalf of the Department of the Interior) for the proposition that flood control has been a principal purpose of the CVP generally or of the Friant Dam and Madera Canal specifically in the *fifty years* since the Department of the Interior's report. To the contrary, the project now operates in large part to capture waters to be used for irrigation in arid western lands, which is why the waters are released into irrigation canals rather than the preexisting river bed, and the CVP has as among its many stated purposes other than flood control "to protect, restore, and enhance fish, wildlife, and associated habitats," "water conservation," and "municipal and industrial power." Central Valley Improvement Act, 102 Pub. L. 575, § 3402, 106 Stat. 4600 (1992).[2]

[2] Respondent floats the idea that the judgment below could be defended on the ground, also not ever raised by the government below (or in any other case so far as we are aware), that immunity applies to *all* waters "that [flood control] projects cannot control," including those that were not carried for purposes of flood control. Respondent's rationale is that "the nexus between the injury and flood control [in that instance] could * * * be assumed." BIO 8 n.2.

3. Respondent's only remaining argument – that certiorari should be denied because the Court declined to review No. 96-2054, *East Columbia Basin Irrigation District* v. *United States* – is just as disingenuous as its newfound factual theory of this case. As the Petition explained and Respondent does not dispute, the government argued that the petition for certiorari in *East Columbia* simply did not implicate the circuit conflict because the plaintiff had presented only the question "whether a multi-purpose project may be subdivided into different parts, some of which enjoy Section 702c immunity and some of which do not." Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 5; Pet. 24 n.7. Indeed, as Respondent explained, the petitioner in that case did "not argue that [the] case would have been decided differently under any other circuit's approach." *Id.* Now Respondent untenably takes the *opposite* position that the *East Columbia* case would have resolved the circuit conflict and that the denial of certiorari in *East Columbia* must mean that, contrary to S. Ct. R. 10, the clear conflict in the circuits on this issue for some reason does not merit the Court's attention.

But that makes is illogical: if waters were contained in a flood control project for purposes unrelated to flood control (*e.g.*, for irrigation or recreation), why could it "be assumed" (indeed, why would it make sense to think at all) that the identical waters were related to flood control once they escaped from the project? For example, this argument would mean that the identical waters unrelated to flood control would give rise to immunity when they escaped (as when someone is swept away through a hole in a dam) but would not give rise to immunity so long as they remained contained within the flood control project (as when someone drowns in a flood control lake). Indeed, that is presumably why this Court in *James* rejected the government's argument that immunity attached to all waters that escaped from flood control projects. *See* Pet. 12-13 n.6.

Moreover, there have been several important developments since *East Columbia*. First and foremost, Respondent assured this Court in *East Columbia* that the conflict in the circuits was immaterial because every court of appeals *including the Ninth Circuit* limited immunity to circumstances in which there is "a connection between the government's management of flood waters and the injury in question." *Id.* at 8. But that assurance was false: once certiorari was denied in *East Columbia*, Respondent did not adhere to that position. Instead, it argued to the Ninth Circuit in this case that, for all waters in any project with flood control as one of its purposes, it "could not think of *any situation* where § 702c would not confer immunity," Pet. App. 9 (emphasis added), and that the requirement of *James* that the waters be carried "for purposes of or related to flood control" was entirely irrelevant, *see supra* (collecting Respondent's assertions below that the question whether an irrigation canal had a flood control purpose was immaterial). In addition, at the time certiorari was denied in *East Columbia*, there was some prospect that Congress would resolve the circuit conflict as suggested by Justice Stevens, *see Hiersche* v. *United States*, 503 U.S. 923 (1992), a possibility that Respondent now conspicuously declines to defend. Finally, the decision below makes plain that the circuit conflict is important and recurring subsequent to *East Columbia*, Pet. 23-25, a point that Respondent does not dispute.[3]

---

[3] In fact, that is precisely the position Respondent recently took in acquiescing to certiorari in *Baral* v. *United States*, despite the fact that this Court had denied Respondent's own petition for certiorari on the identical issue in 1998. *See* No. 98-1667, *Balar* v. *United States*, Br. of the United States 14 n.3 (maintaining that certiorari should be granted because the "conflict in the circuits persists * * * and remains of continuing importance" despite the denial of certiorari in *New York Life Ins. Co.* v. *United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998)).

4. The proper disposition of this case therefore is obvious: the petition for certiorari should be granted and the judgment reversed because dismissal as a matter of law was inappropriate. Given the procedural posture of this case, the complaint should have been dismissed only if the Flood Control Act grants the government immunity even for waters not carried "for purposes of or related to flood control." But that proposition so plainly conflicts with *James* that Respondent does not seriously defend it or dispute that the square conflict with *James* merits review in this Court. There also is no question that this case would have been decided differently in several other circuits, *see* Pet. 13-23, given that the BIO's arguments in denying the conflict rest on its untenable factual premise that the waters that damaged Petitioner's farm served flood control purposes.[3]

CONCLUSION

For the foregoing reasons as well as those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

Timothy Jones
W. Allen Bennett
Sagaser, Franson & Jones, P.C.
2445 Capitol St.
Second Floor
Fresno, CA 92721

Thomas C. Goldstein
(Counsel of Record)
Thomas C. Goldstein, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016

---

[3] *See, e.g.*, BIO 6-7 (no conflict with *James*' requirement of "a factual nexus between an injury and federal flood control activities" because "the injury complained of in this suit (property damage) is asserted to have been proximately caused by the negligent construction of an irrigation canal *that performs flood control functions*" (emphasis added)); *id.* 15 (no conflict with decisions of other circuits because "the construction of the Madera Canal and its operation as an irrigation canal are *directly related to the flood control purpose* of the Central Valley Project" (emphasis added)).